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"Technical" Defenses: Ethics, Morals, and the Lawyer as Friend

Thomas L. Shaffer
Notre Dame Law School, thomas.l.shaffer.1@nd.edu

Robert F. Cochran Jr.

"TECHNICAL" DEFENSES: ETHICS, MORALS, AND THE LAWYER AS FRIEND

THOMAS L. SHAFFER* & ROBERT F. COCHRAN, JR.**

This essay examines the question of lawyer-client counseling on the issue of raising "technical" defenses, such as statutes of limitations. The authors challenge the prevailing notion of American lawyers that technical defenses raise no moral issue worthy of dialogue between lawyers and clients. Looking at the history of legal ethics and modern treatment in European law, they suggest that questions of limitations do raise moral issues. They go on to explore how those moral issues ought to be discussed and decided between lawyers and clients, using the framework of lawyers as godfathers, hired guns, gurus, and friends that they laid out in their book, Lawyers, Clients, and Moral Responsibility. *They conclude by questioning whether these questions are different in a poverty law context and conclude that although the moral questions are not different, the poverty law context suggests a need for sensitivity to the power imbalance between the lawyer and client and the level of intensity of moral persuasion.*

In our book, *Lawyers, Clients, and Moral Responsibility*,[1] we suggest four ways in which a lawyer might deal with a decision during legal representation which has negative implications for people other than the client. The *godfather* lawyer ignores the interests of other people, keeps the issue to himself, and does what he thinks will benefit the client. The *hired gun* defers to whatever the client wants to do. The *guru* considers the interests of other people, and controls the decision by aggressively persuading the client to do what the lawyer believes to be the right thing. The approach we recommend, the practice of our preferred lawyer, the lawyer as *friend*, raises the moral issue with the client, engages the client in moral conversation, and seeks to arrive at moral decisions with the client. Only when the client insists on doing something the lawyer believes to be wrong–only, that is, when moral conversation fails–would the lawyer-as-friend insist on following his own conscience.

In this essay, we consider how this framework might apply when

* Robert and Marion Short Professor of Law Emeritus, University of Notre Dame; Supervising Attorney, Notre Dame Legal Aid Clinic, South Bend, Indiana.

** Louis D. Brandeis Professor of Law, Pepperdine University.

[1] THOMAS L. SHAFFER & ROBERT F. COCHRAN, LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY (1994).

the lawyer represents a client who has a "technical" defense to what otherwise would be a successful civil claim. We suggest, using limitations as a focus, that there are distinctions, distinctions that suggest to us not one question (harm to others) but several. There is a question of whether raising a technical defense is a moral issue at all. In the event that there are moral questions involved, the question is who should decide those questions–the lawyer or the client? In addition, we will consider whether representing a low-income or otherwise disadvantaged client justifies the use of technical defenses in situations where they might not be otherwise justified.

I. TWO CASES

A. First Case

In a videotaped CLE program one of us watched recently, the lawyer on tape described a client whose mother had died seven months earlier leaving a hospital bill of five thousand dollars. The bill was not paid, and her mother left no assets to pay it with. The client had just picked up from her mother's mailbox a letter from a mutual insurance company (homeowners insurance) saying they were paying her mother three thousand dollars for her mother's interest as a policy holder (a common event these days for people who are insured by mutual companies). The probate-code nonclaim period for the hospital bill (statute of limitations) is nine months from the date of death.[2] The lawyer talking on the tape said he told his client she should proceed under the probate code, with his help, to collect the mutual-insurance money, but that she should wait a couple of months to do it–until the time from date of death was more than nine months and it was too late for a creditor to file claims. A lawyer in the audience (not visible but certainly audible) called out, "That is not ethical."

B. Second Case

A typical Midwestern version of the security-deposit section of the Uniform Landlord and Tenant Act provides that when a tenant vacates the premises, provided she gives the landlord her new address, the landlord has (say) 45 days within which to give her a written accounting of his use of the security deposit and to pay her whatever is left from it, if anything. If the landlord does not do these things within 45 days, the tenant is entitled to the return of all of the security deposit, without deductions–plus attorneys' fees if litigation is required.

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[2] This was the Indiana provision. IND. CODE ANN. § 29-1-14-1(d) (West 2002). The parallel time period under the Uniform Probate Code is one year. UNIF. PROBATE CODE § 3-803 (11th ed. West) (amended 1989).

Under case law, the landlord who waits more than 45 days to account may also lose whatever claims he has for damage or unpaid rent.[3]

The practice when representing tenants is to make sure the address is given, even if it is the address of the tenant's lawyer, then to track the time closely, and, when the 45 days is all used up without the landlord having acted, to demand the return of the deposit. If the landlord files for eviction before the time has run, the tenant's lawyer might move for a continuance, so that the matter does not come up for hearing until the time has run. In one of the cases we have in mind, the landlord's lawyer–after a student-lawyer working for a working-poor client in the law-school clinic did all of this–phoned the clinic office and accused the clinical teacher supervising the student-lawyer of being a scurvy lawyer.[4]

As with other limitations cases, the moral issue of whether the tenant owes the money is in abeyance as far as the law is concerned. It does not come up, just as the questions whether there was damage to the apartment and whether there was rent owed do not come up. Limitations issues take the law out of the matter–but limitations issues do not take the moral obligation out of the matter.

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Each of these stories shows a lawyer using "technical" defenses to contest civil (contract) claims. Each involves invoking a statute of limitations to defeat what appears to be an otherwise legally valid claim. In neither case does the lawyer go "to the merits" for his client. And therefore, in both cases, the moral question presented is whether the lawyer or his client or both should behave differently, or whether the lawyer should see to it that his client does. In both cases, the opposing party (the hospital, the landlord) is likely to be wealthier than the client. We see these cases as posing a series of questions that derive from an affirmative answer to the fundamental question here, the question of whether it is possible to be a lawyer and a good person.

II. A Bit of History

The *first question* for lawyer and client here is whether it is im-

[3] *See, e.g.,* Hill v. Davis, 832 N.E.2d 544 (Ind. App. 2005).

[4] In another such case, where the landlord had been represented by counsel from the first, and counsel neglected the case, and the time ran, and after the judge ordered the return of the security deposit, with interest, and barred recovery for damage and unpaid rent, the tenant's supervising attorney asked the student-lawyer, as they walked out of court, whether the student thought they should file a complaint with the disciplinary commission about the other lawyer's poor representation of his landlord-client–proving, if nothing else, that the ethical snarl can be thrown both ways.

moral to plead the statute of limitations to defeat an otherwise valid claim. It is an old question in American legal ethics, however you think of legal ethics–whether legal ethics is morals (being a good person and a lawyer) or regulation, whether you think of legal ethics as if Aristotle or Thomas Aquinas or John Calvin or John Wesley were pondering the issues, or as if your county bar association was pondering them. Reversing the order in that distinction tends to dispose of the distinction and to reduce the question to a moral question: We suspect that the issue of a lawyer's presenting "technical" defenses for her client is not much of an issue when the focus is the modern American legal profession's regulatory apparatus, as if the practice of law were a regulated public utility.[5]

As nearly as we can tell, invoking "technical" defenses is not an ethical issue in that regulatory sense. In fact, failing to raise such a defense when it is available is probably legal malpractice. To say that, though, is not to say that the lawyer who *refuses* to argue a defense under, say, the statute of limitations, violates the professional rules or is liable for malpractice. The professional rules allow for lawyer conscience. But it is to say that the lawyer who refuses is required to say something to her client about her refusal—not to ignore the issue—and then, if the client insists on making the defense, to withdraw in such a way as not to harm the client's case.[6] The moral issue–to put the focus where we want to put it here–is whether it is immoral *not* to refuse.

The grandfather of American legal ethics, the prominent, successful Baltimore lawyer David Hoffman (1784-1854) thought so. Hoffman was the first law professor in the University of Maryland. Although his 1836 *Fifty Resolutions on Professional Deportment* were not a code, in a legal-ethics-as-ethics sense, he was vehement on our question: "I will never plead the Statute of Limitations, when based on the mere efflux of time; for if my client is conscious he owes the debt, and has no other defense than the legal bar, he shall never make me a partner in his knavery."[7] A faint residue from that sentiment,

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[5] We owe this allusion to Professor Sanford Levinson.

[6] See MODEL R. PROF'L CONDUCT, R. 1.16, ("The lawyer may. . .withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement"). In such a case, "a lawyer must take all reasonable steps to mitigate the consequences to the client." MODEL R. PROF'L CONDUCT, R.1.16, Cmt, par. [7] and par. [9]. However, failure to plead the statute of limitations, as Judge Sharswood's comments, *infra*, indicate, is a classic instance of legal malpractice. *See* ROBERT F. COCHRAN, JR., & TERESA S. COLLETT, CASES AND MATERIALS ON THE LEGAL PROFESSION 20 (2nd ed. 2003).

[7] Resolution XII, in II DAVID HOFFMAN, A COURSE OF LEGAL STUDY (2nd ed. 1836), *in* THOMAS L. SHAFFER, AMERICAN LEGAL ETHICS 59, 64 (1985). See Thomas L. Shaffer, *David Hoffman's Law School Lectures*, 32 J. LEGAL EDUC. 127 (1982); Thomas L. Shaffer,

expressed in regulatory language, was in Judge Thomas Goode Jones's Alabama Code of 1887: "An attorney must decline in a civil cause to conduct a prosecution, when satisfied that the purpose is merely to harass or injure the opposite party, or to work oppression and wrong."[8]

Hoffman assumed the question was a moral question, and he decided that it was a moral question for him, the lawyer, only. He seems to have said–gratuitously as it seems–that clients, given a chance, will corrupt lawyers. American lawyers have often assumed that clients, given a chance, will corrupt them. However, they have managed not to arrive at that assumption in this context, because they have first come to different answers on the moral question. American lawyers seem to have decided that if what you want to do is all right for you, perhaps you need not ask your client what she thinks. We might question Hoffman's moral answer and we disagree with his assumption about clients. But we would also argue that not asking about the moral question, because the lawyer has already decided it in the client's favor, is not what a lawyer-as-friend would do. The lawyer-as-friend will, we think, perceive the moral question and then wonder what her client thinks about it. And she may not want to firmly and finally decide what her own moral answer is before she asks her client to talk with her about the question.

American lawyers before and since David Hoffman have pondered the question and some of them have, no doubt, pondered what Hoffman said about it. Few have been as sure as Hoffman was about the answer, and none we know of has been so vehement about it. Hoffman's successor in influence in legal ethics, Judge George Sharswood, was founding dean of the law school in the University of Pennsylvania. Judge Sharswood was clearly not as sure about the morality of lawyers pleading limitations as Hoffman. In his influential 1854 *Essay on Legal Ethics*, Sharswood wrote:

> The party has a right to have his case decided upon the law and the evidence, and to have every view presented to the minds of the judges, which can legitimately bear upon the question. This is the office which the advocate performs. He is not morally responsible for the act of the party in maintaining an unjust cause, nor for the error of the court, if they fall into error, in deciding it in his favor. The court or jury ought certainly to hear and weigh both sides, and the office of the counsel is to assist them by doing that, which the client in person, from want of learning, experience, and address, is

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David Hoffman on the Bible as a Law Book, CHRISTIAN LEGAL SOC'Y Q., Fall 1981, at 5.

[8] The Alabama Code, which was the model for the 1908 American Bar Association Canons, did not explain why the principle did not apply to lawyers for defendants, nor did it suggest that a lawyer might seek her client's view of what is oppressive and wrong.

> unable to do in a proper manner. The lawyer who refuses his professional assistance, because in his judgment the case is unjust and indefensible, usurps the functions of both judge and jury.[9]

In other words, according to this venerable source of American legal ethics, the moral issue, if any, is for the *client*, not for the lawyer. The lawyer's job is to follow the conscience of her client.

Before we explore further the moral reasoning behind that early it's-up-to-the-client American position, we need to pause to look at a modern and European approach to what seems to have persuaded Hoffman that it is wrong to plead limitations. Then we need to get back to Sharswood, who perhaps did not shrug his shoulders as much as the quotation just now might suggest. Recently, the European Court of Human Rights surveyed arguments for and against settled English and American law on adverse possession–that is, statutes of limitations applied to actions for the possession of real estate. The opinions in the case illustrate the moral reasoning behind various positions on the use of statutes of limitations to defeat a claim, whether as a question of law for the courts or a matter of moral discourse for lawyers and clients.

The European Court, by a vote of 4-3, held that application of that settled bit of property law to grazing land in Berkshire violated the European Convention for the Protection of Human Rights and Fundamental Freedoms.[10] (Pause, please, to notice those moral words: "human rights" and "fundamental freedoms.") The opinions in the case, through three levels of the British judiciary and thence to Strasbourg, illustrate the moral arguments made among lawyers in the United States when they have talked about the morality of asserting statutes of limitations for debtors who do not deny that they owe the money. But the European judges, in the light cast by a modern international constitution, also turned the for-lawyers moral issue into law reform.

The trial judge in England held for the adverse possessors, but with misgivings: "It does seem draconian to the owner and a windfall for the squatter that, just because the owner has taken no step to evict a squatter for 12 years, the owner should lose [the] . . . land to the squatter with no compensation whatsoever."[11] He said he was not persuaded by "practical considerations. . .namely the avoidance of uncertainty."[12] (Notice the distinction, hardly uncommon in discussions

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[9] GEORGE SHARSWOOD, ESSAY ON PROFESSIONAL ETHICS 197-98 (5th ed. 1854). Sharswood's essay was consulted for Judge Jones's Alabama code.

[10] J.A. Pye (Oxford) Ltd. v. United Kingdom, App. No. 44302/02, slip op. at 21-22 (Eur. Ct. H.R. Nov. 15, 2005).

[11] *Id.* at 4.

[12] *Id.*

of morals, between what is moral and what is "practical." There are those who would say it is probably not practical to be immoral.)

Lord Justice Mummery, in the British Court of Appeal, did not agree. Although he voted to reverse the trial judge, because the intention element of adverse-possession law was not met on the evidence, he saw the "squatter's" argument as "simply a logical and pragmatic consequence of the barring of the right to bring an action after the expiration of the limitation period," a result calculated to "avoid the risk of injustice [moral word] in the adjudication of stale claims. . .not disproportionate [another moral word, we think], but a reasonable and not . . . excessively difficult burden on the landowner."[13] The House of Lords reversed the Court of Appeal and restored the squatter's title, but, as Lord Bingham of Cornhill put it, "with no enthusiasm" for what those judges regarded as "an apparently unjust result."[14] (And, since it was an unjust result, we suppose his Lordship might say, as a matter of conscience, that the squatter should not have asserted adverse possession, or, as David Hoffman would say, that the lawyer should not have argued adverse possession, or both.)

The European Court reviewed British jurisprudence on statutes of limitation, reciting the arguments that they are protection against litigants who sit on their rights, and, in cases of adverse possession of land, tending toward the security of title, simplifying title searches, protecting marketability, and keeping the peace.[15] The European court noted similar provisions in Swedish, Irish, Northern Irish, Scottish, Hungarian, Polish, Dutch, Spanish, German, and French law.[16] The arguments the other way, which prevailed (in the 4-3 decision) were moral arguments–except perhaps for the assertion (hardly acceptable to an old-fashioned American property teacher) that "fee simple" title is absolute.[17] Under the general heading of "unjust result," the prevailing judges noted that several common law jurisdictions have abolished or "substantially restricted" the law of adverse possession.[18] They purported to explain that development by finding the application of limitations in this instance to be "disproportionate,"[19] thereby perhaps meaning to invoke (or perhaps not) a recurrent and troublesome moral word from modern Christian ethics.[20]

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13 *Id.*

14 *Id.* at 5.

15 *Id.* at 6.

16 *Id.*

17 *Id.* at 13.

18 *Id.* at 18.

19 *Id.* at 19.

20 See James F. Childress, *Proportionality, Principle of*, in JAMES F. CHILDRESS & JOHN MACQUARRIE, THE WESTMINSTER DICTIONARY OF CHRISTIAN ETHICS 512 (1986), citing

They cited as principle the rule that the loss of title due only to the passage of time can only be justified in "exceptional circumstances." Apparently, they meant something more than the passage of time.[21] And, they noted, as the trial judge had, that British law does not require notice from the squatter to the owner that time is running out.[22] Thus, the application of British law, on these facts, "imposed on [the owner] an individual and excessive burden and upset the fair balance between the demands of the public interest . . . and the . . . right to the peaceful enjoyment of their possessions."[23] (We note, in case you missed them, the moral words "excessive," "fair," and "peaceful.")

The dissenters insisted that the majority had made a special case out of adverse possession when all that it is is limitations applied to the possession of land. They noted that the squatters "have done no more than continue to operate a mechanism which, at the end of a relatively long limitations period, adjusts land ownership to reflect the fact that an action for . . . possession is time-barred."[24] That dissenting response seems to say that the limitations issue is not a moral question. Our impression, as law teachers who have accumulated well more than half a century of full-time teaching in half a dozen states, is that most modern lawyers agree that limitations is not a moral question. We find it significant–and therefore bother the reader with European authority–that a modern international court would disagree.

Judge Sharswood did not—for all that appears from the quotation we invoked before we invoked Europe[25]—exclude the possibilities for what Professor Paul Tremblay's calls moral activism.[26] Nor, we think, would Sharswood have discouraged the lawyer's attempting to act as a moral friend–if, perhaps, a pushy friend–in cases such as the two we have put. Sharswood wrote:

> It is not every case in which a man has a legal that he has a moral right to claim the benefit of such laws. . . . [There] are cases which counsel ought to hold up in their proper light those whom they advise. . . . There have been some noble instances of bankrupts who, upon subsequently retrieving their fortunes, have fully discharged all their old debts, principal and interest, though released or barred by the Statute of Limitations. . . . [S]uch instances would be more common if the spirit of high and pure morality, which breathes

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the work of Alan Donaghan, John Finnis, Paul Ramsey, and R.A. McCormick, S.J.

[21] It would be significant in some cases in the U.S., for example, that the squatter had paid real-property taxes.

[22] J.A. Pye (Oxford) Ltd. v. United Kingdom, *supra* note 10, at 10.

[23] *Id.*

[24] *Id.* at 23-24.

[25] *See* text accompanying note 9.

[26] Paul R. Tremblay, *Client-Centered Counseling and Moral Activism*, 30 PEPP. L. REV. 615 (2003).

through the sermon on the mount, prevailed more extensively.[27]

Our first question was whether it is immoral to plead the statute of limitations. Our second question is who decides such a moral question. Hoffman not only made it a moral question for the lawyer (only), but assumed that clients, if their consciences were to be invoked, would choose the selfish alternative. That implication perhaps bothered Judge Sharswood; he seems to have decided to add that he knew clients who had consciences. Hoffman's vehement teaching illustrates what we have called the lawyer as guru, the lawyer who takes moral questions to himself, as the gentleman-lawyers, the Jeffersonians (of whom Hoffman was one), are said to have done. Gentlemen make moral choices because they consider that they are responsible for the moral character of the whole community. Hoffman said, in another paragraph of his *Resolutions*, that he would not argue any legal position favoring his client if he thought it would be bad for the country: "Should the principle be wholly at variance with sound law, it would be dishonorable folly in me to endeavor to incorporate it into the jurisprudence of the country."[28]

The Sharswood answer we quote first illustrates what we have called the lawyer as hired gun. He provided the classic defense of the position: "The lawyer who refuses his professional assistance, because in his judgment the case is unjust and indefensible, usurps the functions of both judge and jury,"[29] and maybe, if the lawyer had bothered to ask, usurps as well the conscience of his client. In a modern context, Professor Monroe Freedman says, "[T]he attorney acts unprofessionally and immorally by depriving clients of their autonomy . . . by depriving them of the ability to carry out their lawful decisions."[30] The more nuanced Sharswood answer (our second quotation from him) also illustrates the lawyer as guru, as the source of moral answers. It is clear who is to "hold up in their proper light those whom they advise," who is to provide in the law office "the spirit of high and pure morality, which breathes through the sermon on the mount." But, unlike the godfather and the hired gun, and even if he is preachy, the guru invokes moral considerations clearly.

None of these shows the lawyer as friend though. None shows a professional willing to engage in moral conversation, to seek moral information from the person she is working with, to seek her client's

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[27] SHARSWOOD, *supra* note 9, quoted in THOMAS L. SHAFFER, AMERICAN LEGAL ETHICS 226 (1985).

[28] DAVID HOFFMAN, A COURSE OF LEGAL STUDY (2d ed. 1836), quoted extensively and discussed in SHAFFER, *supra* note 27.

[29] *Id.* at 198.

[30] MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 57 (1990).

conscience:

> Socrates, in the *Gorgias*, says to the lawyers of Athens, "when you embark on a public career, pray will you concern yourself with anything else than how we citizens can be made as good as possible?" If doing good is all that is involved, the solution might be fairly simple: We would see to it that our clients do what we think is right (as would the guru lawyers). If it involved moral coercion, manipulation, a bit of trickery–those mildly demeaning tactics might be excused by the worthiness of the enterprise. But Socrates did not say "do good"; he said "be good," and that is a more difficult goal.[31]

III. On Practicing Law for Poor People[32]

A. The First Case

On a lawyer-for-poor-folks analysis,[33] a legal-aid lawyer's experience with bill collectors acting for creditors, including doctors and hospitals, can gather moral fiber (or at least moral outrage) by consulting the fact that, in our economy, *the poor pay more*, and making of that fact a moral argument. Consider, for example, our first case and compare what hospitals come after when the patient has no health-insurance coverage (which this client's mother did not have) with what hospitals collect from insurance companies (or from Medicare or Medicaid). Our client's mother ran up a five-thousand-dollar bill. If her mother had been insured, the payment by her medical insurer, or by Medicare or Medicaid–payment in full–would probably have been less than a fifth of that–about a thousand dollars. The amount of the probate claim here, which is like the bill a person from the working poor runs up when he turns up sick at a hospital emergency room, was five times greater than what would have been paid for an insured patient, and that does not take into account interest, collection costs, and attorneys fees that would probably have been added to the claim on the docket of the probate court.

Does that disparity–the facts that this client's mother was uninsured, and that the uninsured pay more–justify a lawyer stiffing the hospital by invoking the statute of limitations to bar its claim? It is probably not relevant that hospitals and their collectors are often inept, but this fact somehow adds to the lawyer's competitive edge; we mention it in passing. And it may not be relevant, but perhaps should

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31 Shaffer & Cochran, *supra* note 1, at 44.

32 We borrow our title for this part from Steven Wexler's classic article on the subject, 79 Yale L. J. 1049 (1970). Wexler's argument pertains particularly to the hired-gun and lawyer-as-friend parts of our analysis: "The lawyer," he said of poor clients, "must help them do their thing or get out." *Id.* at 1065.

33 *See* Thomas L. Shaffer, *Jews, Christians, Lawyers, and Money*, 25 Vt. L. Rev. 451 (2001).

be, that "stiffing" here would likely mean no more than waiting two months to file the affidavit needed under the small-estate act, which requires that the affiant say–swear–that, so far as he knows, he is *entitled* to the assets sought, which here would mean the decedent did not leave any legal debts.[34]

Under the godfather-guru-hired-gun-friend analysis we have proposed in our legal-ethics book, the *lawyer-as-friend* would explain to his client all of the above, without adding Judge Sharswood's pushiness, as he asked his client what his client thinks would be fair (or maybe, here, what his client thinks his client's mother would have done if she had had the mutual-insurance money before she died–which is pushy enough). Whereas the moral discourse of a lawyer as friend often involves the lawyer encouraging the client to give up rights, in cases where the client has been taken advantage of—especially in cases where the client's economic class has been taken advantage of—the lawyer's moral advice may involve encouraging the client to stand up for himself. Social justice is a proper topic for law office discourse with both wealthy and poor clients. In the end, however, the lawyer will defer to the client's considered opinion.

By comparison, the *godfather-lawyer* would say, "Let me take care of it. I will send you the money when the insurance company sends it to me." A godfather-lawyer who wants to give a passing nod to client autonomy might first explain why the client should wait a couple of months before collecting the mutual-insurance money, and then might ask "What do you want to do?" And then he would drum his fingers on the desk until he got an answer. If the answer were "Okay, wait and then get the money," he might say, as the other Godfather did, "Let me take care of it." But at least he would have asked first.

If the client were to balk, with moral misgivings, this Godfather lawyer might start sounding like a Marxist, saying "Think of how the hospital pushed your mother around on her bill! They probably took worse care of her than they take of the fat cat who pays them through insurance–and then ends up paying about a fifth of what they are trying to get out of you. If the hospital manages to wake up and open an estate and file its bill in time–which it can do–we will have to resist the bill. If we have to resist the bill, we are going to argue that hospital charges are not a matter of contract but a matter of what lawyers call quasi-contract—*quantum meruit*—the amount at issue is what is cus-

[34] *See, e.g.*, UNIF. PROBATE CODE § 3-1201. A debt barred by limitations would not, in our view, be "legal" in the sense we mention; it would remain "legal" in some senses, though. For example, it probably could be pleaded as a set-off if this client's mother's estate were to obtain a judgment against the hospital for medical malpractice.

tomary. And if it comes to that, we are going to ask the judge to compare what they are trying to charge your Mom with what they charge the fat cats." This godfather lawyer may not seek to persuade his client of his moral righteousness, but he does have to keep his client on the boat.

A *hired gun* lawyer would present the financial implications of the client's choices–taking advantage of the limitations would be to the client's advantage. If the client is to question the moral implications of doing so, that would need to come at the client's initiative. If the client were to conclude that he should not take advantage of the limitations, the hired gun lawyer would follow the client's direction. In our view, this lawyer fails to show sufficient respect for the client's conscience.

A fifth possibility, which does not fit into any of our lawyer models, is the lawyer who assumes and justifies the morality of the law. In our models, either the lawyer controls the decisions that are made in the law office (under the guru or godfather models) or the client controls the decisions (the hired gun or friend models). Under this fifth model, neither the lawyer nor the client controls the decisions. The morality of the law controls the decisions. This fifth lawyer model, we might call him the "legalist," might tell the client, "I can see how you might think, or the hospital might think, that it is just not right to attempt to defeat this bill with what amounts to a statute of limitations. But a statute of limitations is not just there by accident. It is there because the law recognizes a moral obligation to pay one's debts, but also recognizes that it is wrong to wait too long when somebody owes you money–in this case to wait and hold up the settlement of an estate because they do not act promptly to have their claim considered by the probate judge. They could have filed their claim months ago. So here, you see, you can safely follow the law."

That "legalist" speech (if we have it right) is not one Hoffman would have made, nor probably Judge Sharswood either, not even as advocates, but modern lawyers are much more likely, for good or for ill, to turn to the law for their morals.[35] We do not think many lawyers today would agree with Hoffman's moral tirade, although, perhaps, some aging, parental lawyers do, even today, make Sharswood's pushy argument to clients. And, when we are persuaded to avoid anachronism, we doubt that many of Hoffman's contemporaries took the vehement and moralistic position he took on statutes of limitation; those

[35] *See, e.g.,* the way we read Professor William Simon. SHAFFER & COCHRAN, *supra* note 1, at 33-34, 56-59 (discussing William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988)). *See also* Thomas L. Shaffer, *Should a Christian Lawyer Sign Up for Simon's Practice of Justice?* 51 STAN. L. REV. 903 (1999).

who did not agree with Hoffman, and those, a generation later, who did not agree with Sharswood, would we suspect, have made speeches such as we put in our legalist's mouth here.

B. On the Second Case

The guru's argument to the tenant-client in the second case might have been different, we think, in two ways (circumstances alter cases, even among gurus): First, the morals of taking advantage for a client of the security-deposit statute rests much more on modern considerations of social justice than the argument for statutes of limitation does. However, and on the other hand, the economic disparity between landlord and tenant in a modern urban residential property setting is often not as stark and indicative as the disparity is between providers of medical care and their uninsured patients. In other words, the pastoral argument of the guru-lawyer would have more force in our landlord-tenant case than it seems to have in our hospital bill case.

The statutes regulating security deposits are products of a history of exploitation; they parallel the rare case law that invalidated lease provisions on security deposits that were deemed by judges to be penal.[36] A guru-lawyer pronouncing on the morality of taking advantage of provisions favoring tenants is likely to take into account, and, probably, quote the sort of jurisprudence that views the landlord-tenant laws as favoring landlords at the expense of tenants.

On the other hand (third hand)–supposing the guru decides to give moral advice that tends the other way–landlords renting premises to working-class tenants are often not much better off than their tenants, and, not infrequently, the tenants have been disgustingly egregious in their treatment of the rental property and in paying their rent–both elements of damage the security deposit statute will deny to landlords (often not represented by counsel) if they are not careful. And even when landlords navigate the landlord-tenant act successfully, and recover judgments, their tenants, especially tenants represented by legal-aid lawyers, may be judgment proof. In other words, if the guru is going to announce a moral judgment here, he might want to attend to the particular facts as well as to general (perhaps inapplicable) considerations of social justice.

The godfather-lawyer in a legal-aid office may have become hardened against mom-and-pop landlords (who as often as not represent

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[36] UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 2-101; MODEL RESIDENTIAL LANDLORD-TENANT CODE § 2-401. *See* CUNNINGHAM, STOEBUCK, AND WHITMAN, THE LAW OF PROPERTY 378 (2nd ed. 1993) ("In general, such statutes are designed to give tenants protection the common law never afforded, and courts tend to interpret the statutes against landlords.").

themselves in eviction courts); or he, like a hired gun working in one of these cases, may have decided (a la Wexler) to let his client make the moral decisions. It is the lawyer-as-friend who is most likely to review, in her mind, and perhaps with her client, the relevance of social justice in a case such as this, and it is the friend who is most likely to ask her client, who is thinking about leaving the landlord uncompensated for damages and unpaid rent, "Would that be fair?" To ask that question but also to be open to the client's answer, based on her client's experience with her mom-and-pop landlord, that it would be fair in this case to take advantage of the statute. This is an apposite context to consider Tremblay's moral activism, but it is, we think, sadly, a context where a legal-aid lawyer may not be likely to do it.[37]

C. *The Possibility of Friendship in the Legal Clinic*

One of the challenges for the lawyer who seeks to counsel clients who are at an economic disadvantage–uninsured people and tenants, for two examples–is that friendship, as Aristotle would have it, is ideally a relationship among equals.[38] The lawyer-as-friend is trying to do two things that can be in tension, especially when the lawyer is representing people who are at an economic disadvantage: The lawyer-as-friend seeks to engage her client in moral discourse, but she also seeks to avoid domination of her client. The danger is that she will think she is engaging in moral conversation as a friend (seeking to collaborate in the good, as Aristotle said a friend does) when she is in fact being a guru–imposing her values on her friend. Some of the most thoughtful students (and teachers) of the professional-client relationship have, because of this dilemma, despaired of moral discourse between professionals and their clients. Martin Buber, who described better than anyone the joys of interpersonal relationships, concluded that there is too much distance between the professional and the client for mutuality.[39] He felt that the sides are too unequal: "I see you *mean* being on the same plane, but you cannot."[40] This is especially

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[37] This raises a question some of us legal-aid lawyers occasionally talk about, and probably think about a lot: Is there a special ethic for the poor? Legal aid clients are by definition poor, although some of them are not quite destitute. Can it possibly be enough, given the capitalistic dispositions under which poor people live in the United States, and the legal biases arrayed against poor people by the law–such as the recent "reform" in federal bankruptcy law–to think of representation of the poor in the same "equality before the law" terms lawyers think of when they represent the middle class? *See* Wexler, *supra* note 32; Shaffer, *supra* note 33.

[38] Portions of what follows are adapted from our book, SHAFFER & COCHRAN, *supra* note 1.

[39] MARTIN BUBER, I AND THOU (Kaufman trans., 1942).

[40] MARTIN BUBER, THE KNOWLEDGE OF MAN 171-72 (M. Friedman and R. Smith trans., 1965).

likely to be a challenge with clients who are used to deferring to authority figures.

Nevertheless, it may be that the lawyer's awareness of the power imbalance, of the tendency of the client to defer to the lawyer, and of the lawyer's own temptation to exercise power can be a place to start to overcome the imbalance between the lawyer and client. We have two suggestions for the lawyer who wants to engage the client in mutual moral discourse. The first, is that the lawyer can seek to *empower* the client. Client empowerment begins at the earliest stages of the relationship. Friendly secretaries and accessible lawyers can help to place the client at ease. References to the client that convey *equality* (e.g. lawyer and client each refer to the other as Mr./Mrs. or they each use first names) can signal the client that he is to be a partner in the relationship. The lawyer's manner with the client will also affect the client's willingness to be actively involved in decision-making.

The second way that the lawyer can encourage mutuality is by regulating the intensity with which she engages the client in moral discourse. This serves as a significant qualification to the lawyer as friend model. With friends, one need not "measure words." But not measuring words within the lawyer-client relationship can create the danger of lawyer domination. Friends can be more direct with one another because there is less danger that they will overreach. A difference between the lawyer-client relationship and the friendship relationship is the imbalance of power. The lawyer's power can often overcome a client.[41]

A lawyer can engage a client over a broad range of intensity levels. That intensity can be expressed both in the emotions that the lawyer displays and the statements she makes. We believe that the level of intensity should vary, depending on the client and the circumstances. At one end of the intensity spectrum, a criminal lawyer who has been appointed to represent a woman charged with petty larceny might remain relatively neutral as to moral issues: expressing little emotion, asking non-leading questions ("Has anyone been affected by what you did?" and "What do you think that you should do?"). This lawyer's primary concern might be empowering the client. By contrast, a corporate lawyer who has learned that a corporate executive approved the sale of defective kidney dialysis machines[42] might be quite directive (using methods that border on those of a guru lawyer): emotionally raising the interests of others ("Think what you might do to these patients!"), making a moral judgment ("You did a terrible

[41] *Cf.* Virginia Held, *The Ethics of Care*, *in* THE OXFORD HANDBOOK OF ETHICAL THEORY (David Copp ed., 2006).

[42] *See* Balla v. Gambro, Inc., 145 Ill. 2d 492, 584 N.E.2d 104, 164 Ill. Dec. 892 (1991).

thing!"), and directing the client ("You have got to stop those sales!"). There are, of course, a broad range of levels of intensity between these extremes.

Note that the factual context of the counseling greatly influences the intensity of the lawyer's moral counsel in these examples. Were the criminal lawyer to use the directive counseling with the woman charged with shoplifting ("You must confess!"), he probably would not generate moral discourse–he would merely push the client to follow his wishes. If the corporate lawyer were to use the neutral counseling with the corporate executive ("What do you think you should do?"), she might not generate moral discourse–the corporate official might ignore her. Below are some of the factors that a lawyer might consider when determining the level of intensity with which to engage clients such as those in our cases in moral discourse.[43]

Ability of the Client to Go Elsewhere: In the case of legal aid lawyers or court-appointed counsel, the client generally will not have chosen the lawyer and would have a difficult time changing lawyers. When the client has not chosen the lawyer or would have a difficult time changing lawyers, we think the lawyer should be less directive in moral counsel.

Power of Lawyer and Client within the Relationship: The lawyer's knowledge of the law will give the lawyer substantial power within almost any lawyer/client relationship, but the power within the relationship will also be a function of a host of other factors: age, education, experience, sex, social class, language, race, and status. When the lawyer represents clients such as those in our two cases, the lawyer should be more hesitant to push during moral discourse. The lawyer's natural instincts will, of course, often be in the opposite direction. The powerful lawyer (with weak clients) is likely to feel comfortable asserting power and may overcome the client; the weak lawyer (with powerful clients) is likely to be hesitant to raise moral concerns and may fail to give the independent advice that the client needs. If the lawyer is to both involve the client in moral discourse and not overcome the client, she may need to act against her instincts. The powerful lawyer may need to work to respect the dignity of the weak client; the weak lawyer may need courage to confront the powerful client. In the cases that we consider in this essay, this factor argues strongly for deferring to the client.

Differences in Client and Lawyer Values: The lawyer as friend addresses moral issues with clients in the way that she would address such issues with friends. But there is a danger that a lawyer who seeks

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[43] *See also* Held, *supra* note 41, at 537.

to counsel one with different moral values may think that she is engaging the client in moral discourse, when all she is doing is imposing her values on the client. Lawyers should be aware that there may be differences in moral values between them and their clients and they should be sensitive to those differences. These differences may be more likely to be present in the legal clinic, where lawyer and client are likely to be from different social classes. When there are differences, lawyers should make the moral values *of the client* the focus of the discourse, and be aware that they may be tempted to impose. When there are differences, the lawyer should be more hesitant to insert her values into the discussion.

Danger to Other People: Up to this point in the analysis, the factors we have suggested should be considered in determining the intensity of the lawyer's involvement have focused on the dignity of the client: The lawyer should have sufficient respect for the client to raise moral issues and sufficient respect to not to overreach the client. A final factor that the lawyer should consider when determining at what intensity level to engage in moral discourse is danger to other people. If one of the client's options will create danger to other people, the lawyer should address the moral concerns with greater intensity. The greater the danger, the greater the intensity. In the two cases we consider in this article, the interests at stake are money. In such cases, the lawyer might be more deferential to the client than if, for example, the decisions to be made placed children or the safety of other individuals at stake. The concern for the interests of other people is based on a normative judgment that other people are more important than money.

Of course, after this moral conversation, lawyer and client may disagree about what should be done. When lawyer and client disagree, so long as the lawyer does not believe that the direction that the client wants to go would be wrong, we believe that the lawyer should defer to the client. In cases such as those we discuss here, we believe the lawyer should be hesitant to withdraw.